

Before the
**LIBRARY OF CONGRESS
COPYRIGHT OFFICE**
Washington, D.C. 20540

**GENERAL COUNSEL
OF COPYRIGHT**

JAN 8 1997

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In re: Determination of Statutory)	
License Terms and Rates for Certain)	No. 96-5
Digital Subscription Transmissions)	CARP DSTR
of Sound Recordings)	

**MUZAK'S OPPOSITION TO RIAA'S MOTION TO COMPEL PRODUCTION
OF ALL DOCUMENTS IN THE PUBLIC DOMAIN
RELIED UPON BY MUZAK'S WITNESSES**

Muzak, L.P., through its attorneys, hereby opposes the RIAA's above-captioned motion to compel.

In this motion, the RIAA asks the Copyright Office to order Muzak to do what it has already done -- produce all documents that were "relied upon [by] a witness and responsive to a discovery request." (RIAA Motion, at 2.) Muzak has already produced all documents that were relied upon by its witnesses, and that were responsive to the RIAA's request for documents. In fact, Muzak advised the RIAA of this fact in a December 17, 1996 letter, in which it said: "... Muzak believes that it has produced all of the documents upon which Bruce Funkhouser relied in making his written testimony." (See Letter from Praed to Marks, Tab N to RIAA's Motion.). In addition, Muzak has taken the additional step of conducting a limited review of public documents that were not actually relied upon by its witnesses, but that nonetheless support a statement made by Mr. Funkhouser concerning laws that serve to discourage home recording. Although Muzak is under no obligation to search for and produce such documents, it is doing so in order to accommodate the RIAA. In making this extraordinary effort, however, Muzak is in no way waiving its right to offer any document into evidence at the hearing.

Notwithstanding Muzak's written assurance of compliance and its extraordinary production, the RIAA continues to object to Muzak's proper reservation of its inherent right to offer documents into evidence at the arbitration,¹ and asks the Copyright Office to issue a blanket order denying Muzak this right. Such a request is both premature, and improper under the regulations of the Copyright Office.

The RIAA's request is premature because the arbitration has not yet begun, no documents have been offered into evidence by Muzak, and no actual dispute exists (with all its attendant factual and legal circumstances that can help a decision-maker reach a proper ruling). Because it is premature, the RIAA's request should be denied without prejudice to its right to ask the arbitrators for such an order in the future.

The RIAA's request is improper because the Copyright Office's regulation on the admission of evidence clearly does not establish such a narrow standard. Indeed, the general rule is quite broad: "In any public hearing before a Copyright Arbitration Royalty Panel, evidence that is not unduly repetitious or cumulative and is relevant and material shall be admissible." 37 C.F.R. section 251.48(a). Moreover, the regulations permit documentary evidence to be offered as an exhibit at the arbitration, as long as copies of the document are provided to all other participants "at the hearing." 37 C.F.R. section 251.48(b). Disclosure of documentary evidence prior to the hearing is simply not required, absent an appropriate discovery request or a pre-hearing order. Public documents may be admitted into evidence at the arbitration, without even being physically produced at the hearing. "If a public document . . . is offered in evidence . . . , the document need not be produced physically, but may be offered instead by identifying the document and signaling the relevant parts." 37 C.F.R. section 251.48(d). Because

¹ The RIAA may simply be confused by the wording of Muzak's reservations. Muzak did not mean to imply that Mr. Funkhouser, in making his written testimony, actually reviewed and relied upon any documents that have not been produced (other than documents that might have informed his general knowledge and experience in the industry -- which no party has produced).

RIAA's request is at odds with the regulations controlling the admission of evidence, and because the RIAA has failed to explain why such a deviation is necessary and proper, its request should be denied.

So there is no confusion, Muzak would like to reiterate what it hopes is by now clear -- Muzak has already done what the RIAA seeks -- it has produced all documents relied upon by its witnesses that are responsive to a document request. At the same time, Muzak continues to stand by its proper reservation of its inherent right to present at the arbitration any evidence that is admissible under the rules of the Copyright Office -- including any document that was not responsive to any of the RIAA's document requests, and any document that was not actually reviewed and relied upon by its witnesses in making their written testimony. Likewise, the RIAA retains the right to object at the arbitration to Muzak's offer of evidence on any grounds, including grounds that Muzak failed to produce a document in response to an appropriate request for its production.

For all the above reasons, Muzak requests the Copyright Office to deny the RIAA's motion to compel.

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 8, 1997, a copy of the foregoing pleading entitled Muzak's Opposition To RIAA's Motion To Compel Production Of All Documents In The Public Domain Relied Upon By Muzak's Witnesses was served by fax upon the following:

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